



U.S. Department
of Transportation

Research and
Special Programs
Administration

400 Seventh Street, S.W.
Washington, D.C. 20590

APR 10 1998

BY FACSIMILE

Mr. Manuel Zamorano
Southern California Edison
1201 K Street
Suite 1810
Sacramento, CA 95814

Dear Mr. Zamorano:

I am responding to your request for an informal evaluation of a proposed State law concerning the transportation of high-level radioactive waste or spent nuclear fuel.

As I believe you already understand, the Research and Special Programs Administration (RSPA) does not have adequate resources to conduct thorough reviews of State and local requirements outside of the preemption determination process set forth in 49 C.F.R. § 107.201 et seq. Moreover, informal reviews are hindered by the absence of the public input that occurs in the formal preemption determination process under 49 U.S.C. § 5125(d)(1).

Nonetheless, at your request, I have briefly reviewed Assembly Bill (AB) No. 2192 as provided by you, and I am providing you with my personal, informal, and unofficial comments on the proposal in Section 3 that would add a requirement (in new Health and Safety Code § 114821(f)) for a shipper of high-level radioactive waste or spent nuclear fuel to provide the Department of Health Services with proof and results of full-scale physical testing of casks used to be used to transport these materials.

The criteria for preemption of non-Federal requirements concerning the transportation of hazardous materials are set forth in 49 U.S.C. §§ 5125. In summary, a non-Federal requirement is preempted (unless it is otherwise authorized by Federal law) when:

- (a) it is not possible to comply with both the non-Federal requirement and the Federal hazardous material transportation law or RSPA's requirements in the Hazardous Materials Regulations (HMR), 49 C.F.R. Parts 171-180;

- (b) the non-Federal requirement is an obstacle to accomplishing and carrying out Federal hazardous material transportation law or the HMR;
- (c) the non-Federal requirement concerns any of five "covered subjects" and is not "substantively the same as" requirements in the Federal hazardous material transportation law or the HMR;
- (d) a non-Federal routing requirement does not comply with regulations of the Federal Highway Administration (FHWA); or
- (e) a fee related to the transportation of hazardous material is not fair or is used for a purpose that is not related to transporting hazardous material (including enforcement and planning, developing, and maintaining a capability for emergency response).

RSPA's requirements for packagings or containers used for the transportation of radioactive materials are set forth in the HMR at 49 C.F.R. Part 173, subpart I. These same requirements may also be part of California law, if my understanding is correct that California has adopted the HMR as State law in 13 California Code of Regulations §§ 1160.2(a) (generally) and 1163(b) (packaging).

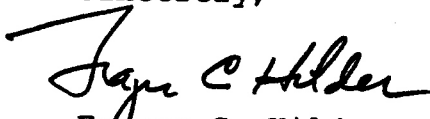
Under the HMR, a "Type B" packaging "that meets the applicable requirements of 10 CFR Part 71 and that has been approved by the U.S. Nuclear Regulatory Commission [NRC]" is authorized for the transportation of high-level radioactive waste spent nuclear fuel. See 49 C.F.R. § 173.416(a). Only the NRC can provide an authoritative interpretation of its requirements, but it is my understanding that the NRC does not require the type of "full-scale physical testing" as specified in AB 2192. Assuming that to be the case, the proposed requirement would be preempted because it is not "substantively the same as" RSPA's requirements about "the design, manufacturing, fabricating, marking, maintenance, reconditioning, repairing, or testing of a packaging or container represented, marked, certified, or sold as qualified for use in transporting hazardous material." 49 C.F.R. § 5125(b) (1) (E).

Because your request was limited to this single requirement, I have not addressed other provisions of AB 2192, such as regulations on times and routes of shipments, tracking programs, convoys and escorts, training, fees, inspections, and insurance. Administrative and judicial decisions concerning these issues are referenced in an "Index to Preemption of State and Local Laws and Regulations under the Federal Hazardous Material Transportation

Law," prepared and maintained by RSPA. A copy of the most recent edition of this index is enclosed with the mailed original of this letter. It is also available on the homepage of RSPA's Office of the Chief Counsel: "<http://rspa-atty.dot.gov>."

I hope these comments are helpful. If you have additional questions or wish to discuss this matter further, please feel free to contact me at 202-366-4400.

Sincerely,

A handwritten signature in cursive script, appearing to read "Frazer C. Hilder".

Frazer C. Hilder
Attorney

Enclosure